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Intoxication and Removal from the Course of Employment: Ohio's No-Fault Exception in *Phelps v. Positive Action Tool Co.*

James H. Grove

INTOXICATION AND REMOVAL FROM THE COURSE OF EMPLOYMENT: OHIO'S NO-FAULT EXCEPTION IN *PHELPS V. POSITIVE ACTION TOOL CO.*

Increased alcohol and drug abuse have caused businesses to incur the high costs of compensating workers who are injured while intoxicated on the job. Many states have solved the problem by adopting a statutory intoxication defense. The author illustrates the danger associated with the continued reliance upon the old common law abandonment defense which permits courts to introduce fault into the no-fault workers' compensation system.

INTRODUCTION

Drug and alcohol abuse[1] in America's labor force have attained unprecedented levels.[2] While absenteeism is perhaps the single greatest cost faced by employers as a result of alcoholism and drug addiction,[3] intoxication in the work place produces another cost: "It has been estimated that substance abusers file five times as many

1. The author recognizes that alcohol is, by definition, a drug. However, this Note uses the terms "alcohol" and "drug" separately to clarify the fact that much of the law, both statutory and common law, has focused upon alcohol intoxication and has not yet addressed the problem of controlled substance intoxication in the workplace.

2. *See* W. SCANLON, ALCOHOLISM AND DRUG ABUSE IN THE WORKPLACE (1986). The prevalence of substance abuse in the workplace is difficult to measure. However, estimates of drug abuse alone indicate that as many as four million workers require treatment. *Id.* at 1. In addition, it has been estimated that ten percent of the American work force are alcoholics. *Id.* at 2. "Recent estimates indicate that 5 to 6 million Americans currently use cocaine and that 23 million use marijuana. The sobering fact is that many of the individuals who abuse alcohol and drugs go to work in our offices, factories and stores." Connors & Engle, *Alcohol and Drug Testing: Legal Considerations*, 42 MO. B.J. 523, 523-24 (1986) (footnote omitted) (citing Marcotte, *Drugs at Work*, 72 A.B.A.J. 34 (1986)). The prevalence of substance abuse can be measured by its annual cost to business and industry. The National Institute of Alcohol Abuse and Alcoholism estimated a cost to society of over 25 billion dollars in 1971. Archer, *Occupational Alcoholism: A Review of Issues and a Guide to the Literature*, in ALCOHOLISM AND ITS TREATMENT IN INDUSTRY 1 (C. Schramm ed. 1977). More current studies indicate significantly higher costs.

> A consensus of the various sources published in the past few years suggests that the cost of alcoholism and drug abuse to business and industry is in the neighborhood of $20 billion and $16 billion, respectively. A more recent report by Peter B. Bensinger, former administrator of the Drug Enforcement Administration, however, places the combined costs significantly higher. He reports that the cost of drug and alcohol abuse is $65 billion per year in productivity losses, lives lost, futures forfeited, and unnecessary accidents.

W. SCANLON, ALCOHOLISM AND DRUG ABUSE IN THE WORKPLACE 2 (1986).

3. Both total and partial absenteeism are blamed for major costs incurred by industry.

workers' compensation claims as persons who are not so afflicted."[4] Ultimately, society bears the costs of employee intoxication.[5] One of those costs is reflected in the ability of an employee to collect compensation for job-related injuries caused by his intoxication at a level deemed insufficient to remove him from the course of his employment. As a partial result of factors which operate against the employer to decrease the likelihood of terminating the chronically intoxicated employee,[6] an increasingly dangerous and costly work environment has emerged.

Ohio has recently responded both legislatively and judicially to this situation. The judicial response, however, has been inappropriate in that it has taken the form of judicial legislation. This Note proposes that the judiciary's treatment of the non-statutory intoxication defense (abandonment)[7] frustrates the principles underlying

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See H. TRICE & P. ROMAN, SPIRITS AND DEMONS AT WORK: ALCOHOL AND OTHER DRUGS ON THE JOB 2-3 (2d ed. 1982) [hereinafter SPIRITS AND DEMONS].

4. Geidt, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 EMPLOYEE REL. L.J. 181, 192 (1985) (citing Brecher, Ipsen, Wallace, Burgower, Morris, Shirley, and Abrams, *Taking Drugs on the Job*, NEWSWEEK, Aug. 22, 1983, at 52, 57); *but see* SPIRITS AND DEMONS, *supra* note 3, at 141-46 (studies have suggested that due to increased caution exercised by intoxicated employees, the routine nature of their jobs and absenteeism in cases of extreme intoxication, the deviant drinker is no more accident prone than his non-drinking counterpart).

5. Whether the costs of on-the-job intoxication are reflected in the establishment of rehabilitation programs for the alcoholic or drug-addicted employee, increased insurance costs to the employer, or compensation claims for injury, the employer will be expected to pass this increment to the consumer by adjusting the price of his product. These, however, are not the only costs. *See* Berry & Boland, *The Work-Related Costs of Alcohol Abuse*, in ALCOHOLISM AND ITS TREATMENT IN INDUSTRY 29-30 (C. Schramm ed. 1977) which states:

> In general, we tend to think of lost production in terms of goods and services that usually flow through the traditional market system. But individuals also produce goods and services in other roles as well . . . . Goods and services produced by and within the household may not have market prices, but they are nonetheless valuable. Thus, to the extent that alcohol abuse lowers productivity in nonmarket activities, society also suffers a real economic loss in the form of foregone goods and services.

6. *See* Spencer, *The Developing Notion of Employer Responsibility for the Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination under Federal and State Employment Statutes and Arbitration Decisions*, 53 ST. JOHN'S L. REV. 659, 662-63 (1979) [hereinafter *Employer Responsibility*] (although an employee may be performing inadequate work, cover-ups may be made by a sympathetic co-worker or by an altruistic employer, thus preventing termination); *see also* SPIRITS AND DEMONS, *supra* note 3, at 132-34. (Cover-ups by alcoholics and drug users may differ. Generally, high status employees rely on self-cover-ups while lower status employees rely more on associates, supervisors and subordinate employees.)

7. The abandonment defense is based on the idea that by his intoxication, an employee has left the scope of his employment and is therefore no longer entitled to workers' compensation for his injuries *See infra* notes 47-64 and accompanying text.

workers' compensation and is incapable of effective implementation.

On August 25, 1986, the Ohio Supreme Court rendered an opinion which clearly demonstrates the amorphous nature of the non-statutory intoxication defense to workers' compensation claims. In *Phelps v. Positive Action Tool Co.*,[8] the court lowered the previously established threshold of the abandonment doctrine and, in so doing, has exposed the weakness of the doctrine. This Note will explore intoxication as a bar to the recovery of workers' compensation and it will emphasize the degree to which the non-statutory intoxication defense, a no-fault basis for denying compensation, fails to strengthen the no-fault system.

I. LEGISLATIVE ACTION

On August 22, 1986, the Ohio legislature followed the majority of states by adopting a statutory intoxication defense to workers' compensation claims.[9] Section 4123.54(B) of the Ohio Revised Code now eliminates compensation where intoxication or the influence of a controlled substance is determined to be the proximate cause of the injury.[10] Denial of compensation for intoxication re-

8. 26 Ohio St. 3d 142, 497 N.E.2d 969 (1986).

9. Among the minority of states which do not provide a statutory defense are: Arizona, Illinois, Missouri, Montana, Oregon, and Washington. Massachusetts and Michigan treat intoxication as a form of willful misconduct capable of barring recovery. *See infra* note 38.

For state statutes providing a defense *see*: ALA. CODE § 25-5-51 (1986), ALASKA STAT. § 23,30,235 (1984), ARK. STAT. ANN. § 81-1305 (1976), COLO. REV. STAT. § 3600(a)(4) (West Supp. 1987), COLO. REV. STAT. § 8-52-104 (1986), CONN. GEN. STAT. ANN. § 31-284 (West 1987), DEL. CODE ANN. tit. 19, § 2353)(b)(1985), D.C. CODE ANN. § 36-303 (1981), FLA. STAT. ANN. § 440.09 (3) (West 1981), IDAHO CODE § 72-208 (1973), IND. CODE ANN. § 22-3-2-8 (West 1978), IOWA CODE § 85.16 (1984), KAN. STAT, ANN. § 44-501 (1986), KY. REV. STAT. ANN. § 342.610 (Baldwin, 1986), LA. REV. STAT. ANN. § 1081(1)(b) (West 1985), ME. REV. STAT. ANN. tit. 39, § 61 (1964), MD. ANN. CODE art. 101, § 15 (1985), MINN. STAT. ANN. § 176.021 (West 1986), MISS. CODE ANN. § 71-3-7 (1982), NEB. REV. STAT. § 48-102 (1984), NEB. REV. STAT. § 616.565 (1981), N.H. REV. STAT. ANN. § 281:15 (1977), N.J. STAT. ANN. § 34:15-1 (West 1959), N.M. STAT. ANN. § 52-1-11 (1987), N.Y. WORKMEN'S COMPENSATION LAW § 10 (McKinney Supp. 1987), N.C. GEN. STAT. § 97-12 (1985), N.D. CENT. CODE § 65-01-11 (1985), OHIO REV. CODE ANN. § 4123.54 (Baldwin Supp. 1986), OKLA. STAT. ANN. tit. 85, § 11 (West Supp. 1987), PA. STAT. ANN. tit. 77, § 41 (Purdon 1952), R.I. GEN. LAWS § 28-33-2 (1986), S.C. CODE ANN. § 42-9-60 (Law. Co-op. 1976), S.D. CODIFIED LAWS ANN. § 62-4-37 (1978), TENN. CODE ANN. § 50-6-110 (1983), TEX. REV. CIV. STAT. ANN. § 8306 (Vernon 1986), UTAH CODE ANN. § 35-1-14 (1953), VT. STAT. ANN. tit. 21, § 649 (1978), VA. CODE ANN. § 65.1-38 (1987), W. VA. CODE § 23-4-2 (1973), WIS. STAT. ANN. § 102.58 (West 1984), WYO. STAT. § 27-14-107(a)(xi)(1977).

10. OHIO REV. CODE ANN. § 4123.54(B) (Anderson Supp. 1986). This statute now provides that a worker whose injury or death is not:

> (A) *PURPOSELY self-inflicted; OR*
>
> (B) *CAUSED BY THE EMPLOYEE BEING INTOXICATED OR UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE NOT PRESCRIBED BY A PHYSICIAN WHERE THE INTOXICATION OR BEING UNDER THE IN-*

lated injuries is frequently based on "proximate cause."[11] Other states employ statutory constructions of "sole" cause,[12] "primary" cause,[13] "direct" cause,[14] or injury "occasioned by intoxication"[15] to bar compensation.[16] Yet, all the statutes share a fault basis for defining the compensable employee.

Despite the enactment of this new bill, the Ohio Supreme Court, unable to apply the legislation retroactively, inappropriately engaged in judicial legislation.[17] *Phelps v. Positive Action Tool Co.*[18] is the substance of that legislation.

II. *PHELPS V. POSITIVE ACTION TOOL CO.*

Bill Phelps, an employee of Positive Action Tool Company ("PATCO") had been consuming alcohol for several hours at a local bar when he was called into work.[19] Before going to work, Phelps stopped at another bar for a drink and then drove to an oil drilling site "to talk with a prospective employee."[20] After leaving the drilling site and while enroute to his employer's plant, Phelps lost control of the company truck[21] and was injured in the resulting

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FLUENCE OF THE CONTROLLED SUBSTANCE NOT PRESCRIBED BY A PHYSICIAN WAS THE PROXIMATE CAUSE OF THE INJURY, is entitled to receive . . . compensation . . . .

Id. (emphasis added).

11. Larson, *Intoxication as a Defense in Workmen's Compensation*, 59 CORNELL L. REV. 398, 406 (1974) (Iowa, Minnesota, Mississippi, and New Jersey utilize the proximate cause standard for determining liability).

12. *See* KAN. STAT. ANN. § 44-501 (Supp. 1984); MD. ANN. CODE § 45 (Supp. 1984); N.Y. [WORK COMP.] LAW § 10 (Consol. 1984); OKLA. STAT. tit. 85, § 11 (West Supp. 1985); *See also* Note, *Workers' Compensation: Should Intoxication Bar Recovery?*, 46 MONT. L. REV. 419, 422 n. 24 (1985).

13. *See* FLA. STAT. ANN § 440.09(3) (West 1966); *see also* Larson, *supra* note 11, at 406 n.48.

14. Larson, *supra* note 11, at 406 n.49.

15. ARK. STAT. ANN. § 87-1305 (1960).

16. Larson, *supra* note 11, at 405-06; *see also* Note, *supra* note 12, at 422-24.

17. *See* Mominee v. Scherbarth, 28 Ohio St. 3d 270, 279 n.8, 503 N.E.2d 717, 724 n.8 (1986) (Celebrezze, C.J., concurring).

> During this 1986 term of the Supreme Court of Ohio, members of the court have repeatedly demonstrated their propensity for substituting their views of what the state's laws should be for those of the General Assembly. This capricious rewriting of Ohio's statutes and dilution of this state's constitutional guarantees has been ill-advised and often dangerous. By way of example only, consider . . . the wholesale rewriting of workers' compensation laws exemplified by . . . Phelps v. Positive Action Tool Co. . . . .

Id.

18. 26 Ohio St. 3d 142, 497 N.E.2d 969 (1986).

19. *Id.* at 142, 497 N.E.2d at 969.

20. *Id.*

21. *Id.* at 146, 497 N.E.2d at 973 (Contradictory evidence was offered at trial as to

accident. A blood alcohol test[22] administered soon after the accident revealed a blood alcohol level of 0.21 percent.[23]

Although the Industrial Commission refused to compensate Phelps for his injuries,[24] upon appeal to the Court of Common Pleas of Wayne County, a jury determined "that the plaintiff was within the scope of his employment and therefore entitled to workers' compensation . . . ."[25]

The Ohio Supreme Court held on appeal that "Phelps' voluntary intoxication was tantamount to his abandonment of employment and that his injury was proximately caused by his gross state of intoxication."[26] The court premised its holding on a finding that Phelps "was incapable of performing the activity incidental to the duties of his employment, that is, driving to the work site."[27]

The judgment, however, was far from unanimous. Only Justices Locher and Holmes concurred with the entire majority opinion.[28] In addition, there was an unpublished concurrence in judgment only by Justice Douglas,[29] a concurrence by Justice Sweeney in syllabus only,[30] and two dissents: one by Justice Brown,[31] and one by Chief Justice Celebrezze.[32]

The dissent by Chief Justice Celebrezze was the most vigorous of the two. Celebrezze criticized the majority for ignoring Ohio precedent[33] and for failing to recognize the limited applicability of the abandonment defense as established by that precedent.[34] The

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whether the accident was caused by a tire blowout or whether Phelps fell asleep behind the wheel of his vehicle).

22. *See infra* notes 88-90, 97-102 and accompanying text.

23. 26 Ohio St. 3d at 142, 497 N.E.2d at 970.

24. *Id.*

25. *Id.* at 147, 497 N.E.2d at 973.

26. *Id.* at 145, 497 N.E.2d at 972.

27. *Id.* at 145, 497 N.E.2d at 971.

28. *Id.* at 146, 497 N.E.2d at 972 (Holmes, J., concurring) (Justice Holmes also indicated that OHIO REV. CODE ANN. § 4123.54, (Anderson Supp. 1986) which became effective three days earlier, was a public policy pronouncement against payment of compensation for injuries incurred during a departure from employment as allegedly occurred in *Phelps*).

29. *Id.* (Douglas, J., unpublished concurrence).

30. *Id.* (Sweeney, J., syllabus concurrence).

31. *Id.* at 157, 497 N.E.2d at 980 (Brown, J., dissenting) (Stating that "[t]he jury in the instant cause determined that intoxication was not the proximate cause of the injury. Proximate cause is normally a question of fact for the jury.") (emphasis and citations omitted).

32. *Id.* at 147, 497 N.E.2d at 973. (Celebrezze, C.J., dissenting).

33. *Id.* at 151, 497 N.E.2d at 976 (Celebrezze, C.J., dissenting) (the issue of severe intoxication barring compensation had previously been resolved in City Ice & Fuel Co. v. Karlinsky, 33 Ohio App. 42, 168 N.E. 475 (1929)). Prior Ohio decisions had allowed compensation even where blood alcohol levels were high. *See infra* note 88 and accompanying text.

34. *Phelps*, 26 Ohio St.3d at 150, 497 N.E.2d at 975. (Celebrezze, C.J., dissenting)

Chief Justice shared Justice Brown's distaste for the ease with which the majority was able "to usurp the jury's sacrosanct role . . . ."[35]

To understand how *Phelps* departs from the traditional application of the intoxication defense, it is necessary to examine the historical development of the doctrine.

III. INTOXICATION AS ABANDONMENT HISTORICALLY

The intoxication defense to workers' compensation claims has its origin in England.[36] The defense avoids the use of fault terminology by barring recovery on the theory that the intoxicated employee has left the scope of his employment.[37] Today, aside from jurisdictions which deem intoxication to be a form of willful misconduct,[38] all but six states[39] have enacted statutes which provide the employer with a defense to workers' compensation claims where intoxication has been a cause of injury.

The intoxication defense arose in England as a common law doctrine in *Frith v. Owners of S.S. Louisianian*.[40] In that case, a sailor who had reached "such a state of intoxication as to render him unable to walk by himself"[41] was helped to regain his ship and "thrown to the deck like a sack of sand"[42] as the ship was leaving

("The difference between a worker who is so intoxicated [that he cannot stand] and a worker who, though intoxicated, suffers a compensable injury during the course of his employment, was enunciated in the post-Frith case of Williams v. Llandudno Coaching & Carriage Co., Ltd. . . .") (citation omitted). *See supra* note 30 and accompanying text.

35. *Id.* at 156, 497 N.E.2d at 980. (Stating that "[q]uestions of fact concerning whether an intoxicated worker's injuries arose in the course of employment are for determination by a trier of fact and will not be disturbed by a reviewing court on appeal unless they are against the manifest weight of the evidence.") (citation omitted). *See supra* note 31.

36. *See* Frith v. Owners of S.S. Louisianian, 2 K.B. 155 (1912).

37. *See* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 34.21 (1985) ("[D]efense[s] have gone on the theory that, by reaching an advanced stage of intoxication, the claimant has abandoned his employment, since he has made himself incapable of engaging in the duties of that employment.").

38. Two states, Massachusetts and Michigan still bar compensation in cases of employee intoxication under willful misconduct statutes. The states which reject the "willful misconduct" defense recognize that although the consumption of alcohol may be purposeful, the resulting intoxication may be completely unintended. There are isolated cases in other jurisdictions in which the defense has been successfully asserted. MASS. GEN. LAWS. ANN. ch. 152, § 27 (West 1979); MICH. COMP. LAWS ANN. § 418.305 (West 1967). *But see* Scraggins v. Lorning Glass Co., 382 Mich. 628, 172 N.W.2d 367 (1969). *See* Larson, *supra* note 11, at 404-05.

39. *See supra* note 9 and accompanying text.

40. 2 K.B. 155 (1912).

41. *Id.* at 158.

42. *Id.* at 160.

port. As the unfortunate sailor attempted to stand, he "staggered backwards and fell into the water"[43] where he drowned. The sailor's death was held not to have arisen from his employment, but rather from his intoxication.[44]

The first American case to rule that ordinary intoxication would not defeat a workers' compensation claim was *Nekoosa-Edwards Paper Co. v. Industrial Commission*.[45] That case, decided in 1913, established that intoxication was not necessarily a form of willful misconduct, and that absent legislative action denying compensation, intoxication was not a defense.[46]

Intoxication was not viewed as abandonment in this country until 1918.[47] In that year, *Hahnemann Hospital v. Industrial Board*[48] established that an intoxicated employee had not abandoned his employment when, ten minutes before he fell down a stairway, the employee was able to issue a receipt for a load of coal.[49] The court cited *Frith* and observed that "intoxication which does not incapacitate the employee from following his occupation is not sufficient to defeat the recovery of compensation although the intoxication may be a contributing cause of his injury."[50] Although the claimant was successful in recovering compensation, the court suggested the possibility of non-recovery in cases involving extreme intoxication.[51]

Ohio first addressed the problem of intoxication in workers' compensation claims in 1929.[52] In *City Ice & Fuel v. Karlinsky*,[53] an intoxicated wagon driver fell from his wagon when one of the

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43. *Id.* at 156.

44. *Id.* at 160.

> The whole question here is whether the accident to this man arose out of his employment. I have not the smallest hesitation in answering that in the negative. It arose out of the fact that he was so hopelessly drunk that he could not stand, and I doubt whether he could see.

Id.

45. 154 Wis. 105, 141 N.W. 1013 (1913).

46. *Id.* at 108, 141 N.W. at 1014 (Majority finding that "[w]hile intoxication in such case to the degree specified might be a misdemeanor under the statute quoted, it is not necessarily wilful misconduct within the compensation act.").

47. Hahnemann Hosp. v. Industrial Bd., 282 Ill. 316, 118 N.E. 767 (1918).

48. *Id.*

49. *Id.* at 325, 118 N.E. at 770 ("The two parties who hauled that coal and took his receipts testified for the appellee that at the time he was intoxicated, but the evidence shows that he was not so intoxicated as to be incapacitated from receipting for the coal.").

50. *Id.* at 327, 118 N.E. at 771.

51. *Id.*

52. City Ice & Fuel v. Karlinsky, 33 Ohio App. 42, 168 N.E. 475 (1929).

53. *Id.*

wheels entered a hole.[54] Based on the finding of a half-empty whiskey bottle in the employee's pocket,[55] the employer insisted that the empoyee's death was caused by his intoxication.[56] The court, however, refused to find that "the employee, if intoxicated, was no longer employed by the company, even though he was actually pursuing the work of the company for which he was employed."[57] Thus, the court held that intoxication would not prevent the employee's widow from recovering compensation.

The jurisdictional standards establishing the point at which intoxication reaches the level of abandonment vary. In Missouri for example, the worker will be barred from recovering only when "intoxicat[ed] to the extent or degree that . . . the employee could not physically or mentally have been engaged in [his work]."[58] Arizona has determined that abandonment occurs at the point at which the worker is "no longer capable of properly performing the duties of his employment."[59] Similarly, Illinois has determined that when an employee "can no longer follow his employment,"[60] the point of abandonment has been reached.

All jurisdictions have adhered, however, to the established tradition of denying compensation only for the most advanced stages of intoxication, and only then when the employee is unable to further the business of his employer.[61] The *Phelps* decision is a clear departure from that tradition. As noted by Chief Justice Celebrezze's dissent, despite a high level of intoxication, there was credible evidence to suggest that the employee was actively engaged in furthering the business of PATCO.[62] The distance the court was willing to go to find that Phelps had abandoned his employment is an indication of the limited nature of the non-statutory intoxication defense.

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54. *Id.* at 43, 168 N.E. at 475.

55. *Id.* at 45, 168 N.E. at 476.

56. *Id.* at 43, 168 N.E. at 476.

57. *Id.* at 45, 168 N.E. at 476.

58. O'Neil v. Fred Evans Motor Sales Co., 160 S.W.2d 775, 779 (Mo. App. 1942). A travelling salesman who was injured in an auto accident shortly after rolling dice for drinks was properly denied compensation by the Commission. The court commented that "if his mind was a total blank on this occasion such condition was not brought about by reason of his employment." *Id.* at 779.

59. Embree v. Industrial Comm'n, 21 Ariz. App. 411, 412, 520 P.2d 324, 325-26 (1974).

60. Hahnemann Hosp. v. Industrial Bd. of Illinois, 282 Ill. 316, 327, 118 N.E. 767, 771 (1918). *See supra* notes 47-51 and accompanying text.

61. The common denominator would therefore seem to be the ability of the employer to benefit from the pre-injury conduct of the employee. *See infra* notes 81-87 and accompanying text.

62. Phelps v. Positive Action Tool Co., 26 Ohio St. 3d 142, 155, 497 N.E.2d 969, 979 (1986) (Celebrezze, C.J., dissenting).

The decision brings the intoxication defense to a point which, arguably, is equivalent to the denial of compensation based on fault principles.[63] In so doing, *Phelps* frustrates the no-fault principle upon which workers' compensation is based.[64]

IV. FAULT IN A NO-FAULT SYSTEM

Although much of the language appearing in state workers' compensation acts has been adopted from the English workmen's compensation statutes[65] introduced by Chamberlain in 1897,[66] the no-fault origin of workers' insurance is generally attributed to Germany.[67] The revolutionary adoption of no-fault compensation for workmen in the United States began in New York in 1910.[68] The wave of legislation which swept this country in the first two decades of the twentieth century was prompted by emerging sympathies for the industrial worker:

> [T]he advanced collectivist . . . believes that society as a whole should share the shock of industrial accidents rather than that it should be borne by the particular individual whose ill fortune it is to suffer it immediately, and so desires to place the burden primarily on the employer, who, in theory at least, can add the cost to the price of his product and so distribute the loss.[69]

Amidst this revolution a funeral pyre burned for the "unholy trinity":[70] assumption of risk, the fellow servant doctrine, and con-

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63. *See infra* notes 74-78 and accompanying text.

64. *See infra* note 81.

65. Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 WIS. L. REV. 57, 68 (phrases such as "arising out of" and "in the course of" are notable examples).

66. The first employers' liability act, which was passed by Parliament in 1880, generally proved inadequate in addressing the realities of the industrial accident. This was due largely to the employer's defense of assumption of risk. J. BOYD, A TREATISE ON THE LAW OF COMPENSATION FOR INJURIES TO WORKMEN UNDER MODERN INDUSTRIAL STATUTES § 18 (1913).

67. *Id.* at § 20.

68. Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35, 52 (1917). (The difficulties which states experienced in enacting this sweeping system is noted by the fact that while the Massachusetts legislature began to examine the subject as early as 1898, that state did not enact its workman's compensation provision until 1908. Commissions for study were also formed in Illinois and Wisconsin prior to the 1910 adoption in New York. Once adopted, the acts were subjected to constitutional challenges. The original New York law was held unconstitutional the following year. *Id.*

69. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 330 (1912).

70. *See* PROSSER & KEETON, TORTS § 80 (5th ed. 1985).

tributory negligence.[71] The demise of the employer's defense of contributory negligence is the mainstay of workers' compensation. By eliminating an inquiry into fault, foregone litigation expenses may be passed on to the deserving employee in the form of compensation.[72]

The traditional construction of the intoxication defense of abandonment avoids inquiry into fault.[73] By defining abandonment as applying only to those employees incapable of performing any acts beneficial to the employer, the economic integrity of the system is maintained. But what becomes of the system when inquiry must be made into the cause of the employee's injury?

In his dissent in *Phelps*, Chief Justice Celebrezze unabashedly condemned what he viewed as a resurrection of contributory negligence.[74] The import of this warning must not be subrogated to instincts which preach that a worker who "contributes" to his own injury by increasing the risk of its incidence through intoxication deserves to reap what he has sown. Once the court has determined that abandonment may occur while the employee is still engaged in an activity which benefits the employer, the foundation for barring recovery becomes one of fault.[75] As such, in situations where more than one cause of injury is suggested, contributory negligence becomes operative.

Despite the conviction that intoxication has no place in the employment environment, the defense of contributory negligence, even if allowed, would not aid the intoxication dilemma for two reasons. First, the deterrent effect of contributory negligence is of dubious value. "[T]he defense of contributory negligence offers amnesty to a careless defendant every time it administers a deterrent lash to a careless plaintiff, so that its effect as a deterrent is exactly offset by

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71. *See infra* note 74 and accompanying text.

72. There may, however, be other costs associated with the system. *See* Kasper, *The Faults of No-Fault: The Case of Workers' Compensation*, 53 CAL. ST. B.J. 92, 94 (1978).

> [W]hile workers' compensation does not require a determination of fault, it does necessitate the determination of a number of other frequently contested issues, such as whether the injury "arose out of" the worker's employment or whether the damages were the result of the preexisting condition of the worker. Thus, contested jurisdictional and causation issues must still be decided and are likely to effect some of the cost savings expected from a no-fault system.

Id.

73. *See supra* note 37 and accompanying text.

74. Phelps v. Positive Action Tool Co., 26 Ohio St. 3d 142, 153-54, 497 N.E.2d 969, 978 (1986)(Celebrezze, C.J., dissenting).

75. It is at this point, too, where the total cost of production will fail to be represented in the price of the product.

its invitation to be careless without penalty."[76] The ever-present threat is that intoxication could be made the scape-goat for the employer's negligence. Further, the deterrent effect of a rule of contributory negligence upon an individual who is already in violation of employment rules against intoxication is also questionable.[77] Rather, in a "firm" setting where no-fault liability exists, "contributory negligence puts its pressure on the wrong place and relieves the pressure where it will do the most good. It is a net incentive to carelessness, not to safety."[78]

Secondly, the litigation spawned by the introduction of causation issues is prohibitive and threatens the workers' compensation fund itself. At the inception of workers' compensation, "the elimination of fault related issues was a means of obviating costly and sometimes spurious litigation, as well as saving court resources and attorneys' fees."[79] The extended reach given the abandonment doctrine by *Phelps* would jeopardize this benefit. It is recognized that "[l]itigation cannot be avoided entirely. Some facts must always be proved, and evidence of them may conflict."[80] However, by limiting the availability of the abandonment defense to those cases where the employee is clearly incapable of benefitting his employer in some way, the number of cases litigated could be reduced.

Indeed, it is at the point of cessation of net benefit to the em-

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76. James, *Contributory Negligence*, 62 YALE L.J. 691, 701 (1953) (citing Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 681-83 (1934)).

77. *See* Marmo, *Arbitrators View Alcoholic Employees: Discipline or Rehabilitation?*, 37 ARB. J. 17, 18 (1982):

> Few contracts or company rules address the problem of alcohol abuse at any length. In almost half the instances examined, employees were disciplined for unacceptable use of alcohol even though no formal standard of acceptable behavior had ever been established. Frequently, the disciplinary action taken by management was based on its contractual right to discipline employees for just cause.

78. James, *supra* note 76, at 702; *see also* NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972) [hereinafter THE REPORT OF THE NATIONAL COMMISSION].

> Because the employer's control over working conditions far exceeds that of the employee, we believe that assigning to the employer the largest portion of the costs of work-related injuries and diseases will best serve the objective of safety. It might be argued that the appropriate way to assess the cost of work-related impairments is on a case-by-case basis, with the burden assigned in proportion to each party's negligence. This scheme, however, would be inherently litigious and would clearly violate the objective of an effective delivery system.

Id. at 39.

79. Ashford & Johnson, *Negligence vs. No-Fault Liability: An Analysis of the Workers' Compensation Example*, 12 SETON HALL 725, 731-32 (1982).

80. Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 WIS. L. REV. 57, 72; *see supra* note 72.

ployer that abandonment takes on meaning in terms of the stated policy objectives of workers' compensation.[81] Where the cost of the additional risk produced by the intoxicated employee outweighs the benefit of the duties performed for the employer, the intoxication has ceased to be a "reasonable" cost of production.[82] This, then, is the most logical threshhold for the intoxication defense. Since one of the goals of workers' compensation is to reflect all true costs of production in the price of the product,[83] and since elevated risk which exceeds all possible benefit cannot properly be called a cost of production, intoxication which creates such a negative value to the employer must fall outside the realm of workers' compensation.

The *Frith* holding espoused this concept. The benefit available to the employer had been reduced to zero when the employee became "totally incapacitated from discharging any of the duties attached to his office, and he did not *attempt* to perform them."[84] Similarly, the risk of injury to the sailor, which was high when taking into consideration the nature of his work, needed only to exceed the possible benefit to his employer to produce an unreasonable cost of production.

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81. The National Commission on State Workmen's Compensation Laws cited five major objectives for an effective program. "The . . . objectives are: [b]road coverage of employees and work-related injuries and diseases . . . [s]ubstantial protection against interruption of income . . . [p]rovision of sufficient medical care and rehabilitation services . . . [e]ncouragement of safety . . . [a]n effective system for delivery of the benefits and services." THE REPORT OF THE NATIONAL COMMISSION, *supra* note 78, at 15.

> Most radical of all these objectives was the establishment of a legal principle alien to the common law: liability without fault. The costs of work-related injuries were to be allocated to the employer, not because of any presumption that he was to blame for every individual tragedy, but because of the inherent hazards of industrial employment. Compensation for work-related accidents was therefore accepted as a cost of production.

Id. at 34.

82. In order to determine the point at which reasonable costs of production cease, however, it is imperative not to beg the question. At the point of injury, hindsight allows the conclusion that benefit to the employer has been exceeded by the liability the employer faces. Rather, assessment of net benefit must be made in light of the risk at the point immediately prior to the injury. *See infra* text accompanying note 83.

83. *See* Oi, *Workmen's Compensation & Industrial Safety*, in SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 41 (1973).

> [T]he economic theory of joint production is reviewed for three reasons. First, no one intentionally "produces" industrial accidents. Work injuries are accepted as undesirable "bad" by-products in order to obtain larger outputs of [production] . . . . Second, an externality can conveniently be regarded as a by-product for which there is no market. Third, it shows how the technical trade-offs between injuries and goods can be influenced by both the employer and employee. A real cost of greater industrial safety is the value of the resources that are devoted to accident prevention and that otherwise could have been used to produce more.

Id. at 42.

84. Frith v. Owners of S.S. Louisianian, 2 K.B. 155, 158 (1912) (emphasis in original).

An individual may be able to operate adequately while in a state of intoxication,[85] thereby providing a sufficently high benefit to his employer. In this way the increasing risk of accident produced by his intoxication may reflect a true cost of production.[86] In *Phelps*, there was good reason to find that such a level of benefit had been received by the employer.[87] The limitations of the non-statutory defense are therefore clear. Only in a situation where the employee is not performing the duties of his employment, such as when he has passed out due to his intoxication, may the absence of benefit to the employer be assessed with any accuracy. In short, although the abandonment defense successfully avoids the introduction of fault into workers' compensation, it may tolerate a more dangerous work environment. That fact alone, however, should not permit the judiciary to introduce fault into a no-fault system.

V. INTOXICATION: LEVELS AND TYPES

A. *Blood Alcohol Level*

A meaningful analysis of intoxication in the work place requires an understanding of its two components: level of intoxication and type of intoxication. To some extent, the distinction is currently unimportant as only alcohol-induced intoxication is capable of being measured with any relative accuracy. Nevertheless, as technology improves it is likely that methods will be developed for measuring the level of drug-induced intoxication.

The majority in *Phelps* did not indicate an objective level at which a court should find that an injury arose from intoxication rather than from employment. While Phelps had a blood alcohol level of 0.21 percent,[88] former Ohio precedent had indicated that

85. *See infra* note 101 and accompanying text.

86. In Iowa, for example, the legislature felt there was a strong need for volunteer fire fighters. The legislature passed a bill which would have allowed compensation for volunteer fire fighters who had blood alcohol levels of up to 0.15%, a level 0.02% higher than that allowed by state drunk driving laws. *See* UPI Proprietary, Thurs. A.M., April 25, 1985 (NEXIS) (bill vetoed by Governor).

87. In his dissent, Celebrezze noted several factors from which the employer derived benefit:

> The instant record is replete with evidence which sustains the verdict. For example, there was credible evidence before the jury that, among other things appellee was driving a company truck; he had received a telephone call from a PATCO worker regarding a plant production problem; such calls were routine because of the nature of Phelps' supervisory position; he was enroute to the plant; he had, immediately preceding the accident, been on a recruiting visit at a drilling site.

Phelps v. Positive Action Tool Co., 26 Ohio St.3d 142, 155, 497 N.E.2d 969, 979 (1986)(Celebrezze, C.J., dissenting).

88. *Id.* at 142, 497 N.E.2d at 970.

such a level would not remove an employee from the course of employment.[89] Therefore, the majority's treatment of the jury finding below may indicate the Ohio Supreme Court's willingness to overturn awards for compensation in situations where the level of intoxication exceeds 0.21 percent.

If such a willingness actually exists, however, it has not prevented the Ohio Court of Appeals in *Chester Scafford, Inc. v. Hanley*[90] from awarding compensation where decedent's blood alcohol level was stipulated to have been 0.27 percent.[91] In that case, the worker had consumed five to six beers during his lunch break before resuming work on the Perry Memorial at Put-in-Bay.[92] After lunch, the worker ascended the scaffolding at the monument "to a height exceeding two hundred feet,"[93] before falling to his death. The Ottawa Court of Common Pleas, which was unable to rely on section 4123.54(B) of the Ohio Revised Code,[94] granted summary judgement for the decedent's widow.[95] The employer appealed, basing his argument on *Phelps*.

The Ohio Court of Appeals, relying on the stipulated facts and the *Phelps* decision, determined that the blood alcohol level alone could not remove the employee from his employment:

> Appellant proffers the blood-alcohol content of the decedent as proof sufficient to meet its substantial burden of proof. This evidence fails to sufficiently establish that decedent was incapacitated from following his occupation. Indeed, the evidence that decedent ascended two hundred feet of scaffolding in accordance with his employment vitiates any presumption of abandonment inferred from a measurement of decedent's blood-alcohol content.[96]

In states where intoxication is a statutory defense, compensation has been awarded in the presence of a wide range of blood alcohol

89. Higgins v. Daugherty, No. 81AP-405, slip op. at 6-7 (Ohio App. Mar. 30, 1982) (an employee with a blood alcohol level of .21 percent was determined to be in the course of her employment despite operating a motor vehicle for her employer in an impaired condition).

90. No. 23160, slip op. J7-91 (Ohio Ct. App. Sept. 4, 1987).

91. Appellee's Brief and Reply at 1, Chester Scaffolding, Inc. v. Hanley, No. 23160, slip op. J7-91 (Ohio Ct. App. Sept. 4, 1987).

92. Chester Scaffolding, Inc. v. Hanley, No 23160, slip. op. J7-91 (Ohio Ct. App. Sept. 4, 1987).

93. *Id.*

94. Appellee's Brief and Reply at 3, Chester Scaffolding, Inc. v. Hanley, No. 23160, slip. op. J7-91 (Ohio Ct. App. Sept. 4, 1987).

95. Chester Scaffolding, Inc. v. Hanley, No. 23160, slip. op. J7-91 (Ohio Ct. App. Sept. 4, 1987).

96. *Id.* at J7-93-94.

levels.[97] This range reflects a belief that a worker's injury is not always related to his level of intoxication. Similarly, in states which do not have a statutory intoxication defense, high levels of blood alcohol have not prevented awards.[98] Ohio, too, has refused[99] to "decide precisely at what point and under what circumstances an employee, through severe intoxication, can remove himself from the scope of his employment."[100] Failure to deny compensation solely on the basis of intoxication level suggests that blood alcohol level alone is not determinative of the benefit received by the employer from the worker's performance.[101] Indeed, some employers fully contemplate the likelihood of employee intoxication in the course of conducting business. Where, for example, an employee has public relations duties which tend to expose him to intoxication, the employer nevertheless expects net benefit from the dealings of his employee.[102] In such instances, reasonable costs of production may allow for higher levels of intoxication. The use of a standard level to bar compensation would, therefore, not promote true cost allocation.

The difficulty with all intoxication defenses, whether statutory or not, is that they embrace several types of workers: both the

97. *See* A. LARSON, *supra* note 37, § 34.13 (1985). Awards of compensation are not uncommon in situtations where the employee's blood alcohol level exceeds 0.30%. In New York, for example, eight such awards have been granted - the highest blood alcohol level being 0.35%. The Minnesota Courts have awarded compensation where intoxication exceeded 0.30% while denying it at an intoxication level of 0.2858%. Similar discrepencies exist in many other states.

98. Oregon has awarded compensation where blood alcohol levels reached 0.37% and 0.40%. *See* Boyd v. Francis Ford Inc., 12 Or. App. 26, 504 P.2d 1387 (1973) (employee killed in one car accident after drinking with "prospective purchasers"); Beneficiaries of McBroom v. Chamber of Commerce, 77 Or. App. 700, 713 P.2d 1095 (1986) (employee found dead in hotel jacuzzi where he was attending a weekend conference).

99. Ohio has deemed that the actual point of abandonment is dependent on no one single factor. *See* Phelps v. Positive Action Tool Co., 26 Ohio St. 3d 142, 144-45, 497 N.E.2d 969, 970-71 (intoxication alone does not necessarily constitute a departure from employment); *Chester Scaffolding, Inc.*, at J7-93 (abandonment jury question).

100. American Safety Razor Co. v. Hunter, 2 Va. App. 258, 259, 343 S.E.2d 461, 463 (1986) (The employee was injured from a fall when the forklift on which he was standing unexpectedly lurched backwards. Rather than argue that intoxication was the cause of the fall, the employer contended that by reporting to work with a blood alcohol level of approximately .307 percent, the employee had removed himself from the scope of employment. The court, however, dismissed the employer's defense because the employee had been actively performing his duties at the time of injury).

101. Aside from issues of benefit to the employer, the blood alcohol test itself is only admissible as evidence of intoxication under specific conditions. *See infra* notes 109 & 110.

102. *See* West Florida Distrib. v. Laramie, 438 So.2d 133 (Fla. Dist. Ct. App. 1983) (employer's policy of encouraging salesmen to drink with customers estopped employer from asserting the intoxication defense).

chronically intoxicated employee, and the employee whose intoxication at work is highly unusual but which unfortunately coincides with his injury. Instinctively there is more compassion for the latter employee—perhaps out of identification with occasional bad judgment. It is not difficult to imagine a scenario in which a model employee, having celebrated a special occasion on his lunch hour, becomes minimally intoxicated and sustains an injury upon returning to work. In such an instance, a system which denies compensation only to employees with severe levels of intoxication would seem to eliminate the harsh sanction on the first-time-intoxicated employee. Such a consideration, however, cannot be the basis for choosing the abandonment doctrine over a statutory proximate cause defense. First, the intoxication-causing behavior is no less volitional for the worker above than it is for the alcoholic. Second, and more importantly, the blood alcohol differences between the first-time-intoxicated employee and the heavy drinker are not necessarily indicative of ability to perform while intoxicated. "[The] habitually heavy drinker develops a tissue tolerance for alcohol which may require doses' three to four times greater than a moderate drinker would have to drink to produce characteristic behavioral effects."[103] In the same manner, the moderate drinker may suffer greater physiological effects from significantly reduced amounts of alcohol.[104] Both create unreasonable risks to themselves and their fellow employees. A distinction between these two groups of employees is therefore unfounded.

B. *Drug Intoxication*

Although the majority of this discussion has concentrated on alcohol-induced intoxication, with the increased use of drugs in the work place,[105] intoxication defenses in the future may present special problems to the employer. Surprisingly, very little action has been taken by state legislatures to explicitly bar compensation for injuries which occur while under the influence of a controlled substance. In that respect, Ohio's legislation is progressive.[106] At least one court has ruled that in barring compensation, intoxication need

103. A. KOVEN & S. SMITH, ALCOHOL-RELATED MISCONDUCT 79 (1984).

104. *Id.* at 79 n.64 (several physicians have indicated that actual intoxication may occur at minimal levels and that non-drinkers are especially vulnerable).

105. *See supra* note 2 and accompanying text.

106. *See supra* note 10 and accompanying text. *See also* N.D. CENT. CODE § 65-01-02(7) (1985) (where a compensable injury is defined to exclude an "injury received because of the use of narcotics or intoxicants while in the course of employment").

not be alcohol-specific.[107] For the most part however, the issue has not yet been addressed. "[I]t seems inevitable that this issue will have to be squarely confronted sooner or later, and when it is, the parties will have to turn to the only two available sources of authority: dictionaries, and non-compensation cases."[108]

Drug intoxication presents an added difficulty for the employer in terms of proof. While evidentiary findings of blood alcohol content must conform to standards which ensure accuracy,[109] the standards for drugs have yet to be determined. Despite advances in technology which assure greater degrees of accuracy in drug testing programs,[110] the results of these tests are determinative of drug *use* rather than intoxication.[111] If, for example, Phelps had been given a urinalysis subsequent to his accident which tested positive for cocaine, the test results would not indicate Phelps' degree of intoxication at the time of the accident. In the same manner, testimony of a witness to the effect that Phelps was seen smoking marijuana[112] or

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107. Texas General Indem. Co. v. Jackson, 683 S.W.2d 879, 881 (Tex. Ct. App. 1984). The court drew upon the state's provision for involuntary manslaughter and concluded that in a workers' compensation case, "intoxication could result from the 'voluntary introduction of *any* substance into his body.' " (citation omitted).

108. A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 34.39 (1985).

109. *Id.* at § 34.12.

> [T]he blood must be positively identified as that of the deceased. The time interval between the injury and the administration of the test must not be too great. The sample of blood must be adequate, and the equipment must be correct and must not have been recently cleaned with alcohol. And a qualified person must testify as to the circumstances surrounding the taking of the sample.

Id. (footnotes omitted). *See, e.g.*, Erickson v. North Dakota Workmen's Comp. Bureau, 123 N.W.2d 292 (N.D.1963) (an unsealed blood sample was inadmissible as evidence where the sample had been accessible to others). *See also* United Pacific Ins. Co. v. Jones, 710 S.W.2d 760 (Tex. Ct. App. 1986) (gaps in chain of possession of blood sample impeached its trustworthiness).

110. Higher degrees of accuracy in drug testing may be obtained when more expensive follow-up tests are performed after routine urinalysis tests. *See* Rust, *Drug Testing: The Legal Dilemma*, A.B.A.J., Nov. 1, 1986, at 50.

> CompuChem uses gas chromatography/mass spectrometry (GCMS) exclusively for follow-up testing. GCMS reduces the constituent chemicals to their molecular level and identifies "fingerprint" of a specific drug. According to Bensinger, while GCMS tests have not yet been able to identify steroid use in athletes, they are "100 times 99.9 percent accurate" in confirming the presence of the nine most commonly abused drugs - amphetamines, barbituates, benzodiazepines . . . . cocaine, marijuana, opiates, PCP, methaqualone and methadone.

Id. at 52.

111. *See Drug Testing in the Workplace: A Clash of Rights*, Legal Times, Aug. 4, 1986, at 27, col. 2. "Opponents of testing have argued that results of urine tests have no relationship to on-the-job performance because they do not indicate present impairment. Urine testing detects the presence of metabolites of drugs in the body but does not directly measure impairment." *Id.* at 28, col. 4.

112. *See* Aetna Casualty & Surety Co. v. Silas, 635 S.W.2d 424 (Tex. 1982) (despite facts

taking pills[113] prior to his accident would not be determinative of intoxication. Drug intoxication is, therefore, much more of a potential problem for the employer—even under Ohio's new provision. One may assume, however, that as familiarity with narcotic intoxication increases, precise methods of measuring the levels of drug intoxication will also arise.

CONCLUSION

Increased drug and alcohol abuse will continue to be a major cost for business and industry. One of those costs will be in the form of compensation paid to workers who were injured while intoxicated on the job. The non-statutory intoxication defense of abandonment has been an attractive doctrine because it avoids the determination of fault. Unfortunately, it has also allowed employees to collect for injuries caused solely by their intoxication. But to the extent that the employer was receiving a benefit from the activities of the employee prior to the injury, there is a strong argument that the injury should be borne as a cost of production.

The historical application of the abandonment defense has assured that only where the employer was not benefitting from the activities of the employee would compensation be denied. This was accomplished by finding abandonment only in the most advanced stages of intoxication; cases where the employee was completely incapacitated. The *Phelps* decision, however, lowers the threshhold of the abandonment doctrine.

In light of Ohio's new statutory intoxication defense, the implications of the *Phelps* decision are limited in Ohio. Nevertheless, the decision serves as a warning to other jurisdictions which still rely on the abandonment defense. The judiciary should not be tempted to do what the legislators have failed to do. Any alteration of existing workers' compensation acts must be initiated by state legislatures. Those states which continue to rely on the antiquated doctrine of abandonment risk the improper introduction of fault into a no-fault system.

JAMES H. GROVE

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that employee was seen smoking a hand rolled cigarette and that marijuana was later found in his lunch box, the absence of evidence of intoxication kept the issue from the jury).

113. *See* Texas General Indem. Co. v. Jackson, 683 S.W.2d 879 (Tex. Ct. App. 1984) (testimony that employee was seen taking pills and later exhibited "light" behavior was not evidence of intoxication).